

(A)

No. 94-3



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1994

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REYNOLDSVILLE CASKET Co., *et al.*,  
*Petitioners,*  
v.

CAROL L. HYDE,  
*Respondent.*

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On Petition for a Writ of Certiorari to the  
Supreme Court of Ohio

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**RESPONDENTS SUPPLEMENTAL BRIEF  
IN RESPONSE TO MOTION FOR LEAVE  
TO FILE AMICUS CURIAE BRIEF**

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**I. THE AMICUS CURIAE MOTION FOR LEAVE AND  
 BRIEF ARE UNTIMELY, AND SHOULD NOT BE  
 CONSIDERED BY THIS COURT.**

The amicus curiae motion and brief filed on behalf of the Dalkon Shield Claimants Trust ("Trust") is untimely, and should not be considered by this Court. The Petition for Writ of Certiorari was filed on behalf of the Petitioner on July 1, 1994. The Memorandum in Opposition to the Petition For Writ of Certiorari was due to be filed on July 31, 1994. The brief in opposition was filed by Respondent on July 28, 1994. The Trust filed its motion and brief on August 3, 1994.

Supreme Court Rule of Practice 37.4 provides in part as follows:



. . . A motion will not be received unless submitted within the time allowed for the filing of an amicus brief on written consent. . . .

Supreme Court Rule of Practice 37.2 provides in part as follows:

A brief of an amicus curiae submitted prior to the consideration of a petition for a writ of certiorari or a jurisdictional statement accompanied by the written consent of all parties may be filed only if submitted within the time allowed for filing a brief in opposition to the petition for a writ of certiorari or filing a motion to dismiss or affirm. . . .

The Trust had until July 31, 1994 in which to file its brief. .

Since the amicus curiae brief was not filed in a timely manner consistent with Supreme Court Rule of Practice 37, the Court should not consider the motion or brief.

## II. THE TRUST HAS MISSTATED MATERIAL FACTS IN ITS BRIEF.

Even though the amicus brief is untimely, Respondent nonetheless feels compelled to briefly address the allegations in the Trust's brief. The Trust was established ". . . to assume any and all liabilities of Robins . . . and to satisfy . . . all Dalkon Shield personal injury claims . . ." (Claimants Trust Agreement, CTR-1, Plan Exhibit A to Robins Sixth Amended and Restated Plan of Reorganization [Plan]). In practical terms it wears two hats, and therefore is akin to an insurance company by reviewing and setting claims while it is also the defendant in litigation brought by Dalkon Shield victims who reject settlement offers.

When it is the defendant, the Trust uses available limitation defenses against only the most injured, women who seek more than \$20,000.00 in damages. Statutes of limitation are not considered by the Trust when making of-

fers of settlement; are not raised in arbitrations in which the victim seeks \$20,000.00 or less in damages; but are raised when the claimant has a serious injury, pursues litigation and seeks compensation in excess of \$20,000.00.

The Trust correctly notes that because of *Hyde v. Reynoldsville Casket Company* (1994), 68 Ohio St. 3d 240, 626 N.E. 2d 75, it cannot now raise the statute in Ohio as a defense, but fails to mention that when the Ohio Dalkon Shield victims filed claims, they were *timely*, and *not* barred by any statute. The tolling statute they relied upon when many of them filed timely claims was not held unconstitutional in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 100 L.Ed. 896, 108 S.Ct. 2218 (1988), until *after* they filed claims. *Hyde* simply confirmed their vested right to proceed to litigation against Robins' liability successor.

The Trust suggests *Hyde* will ". . . [benefit] Ohio Dalkon Shield claimants to the detriment of claimants in other states and [encourage] the depletion of Trust funds through litigation by Ohio claimants . . .". Amicus brief at 1. Respondent Carol Hyde disagrees for three reasons.

First, concerned that, (1) the Trust was raising statutes of limitation defenses only against the most injured, and (2) that in some states statutes of limitations were not available as a defense to the Trust, a number of state legislatures have recently passed legislation prohibiting the Trust from raising the statutes as a defense. (See, the statutes of New York, Kansas and California, attached hereto as Appendix, pp. 1a-5a.) Therefore, *Hyde*, rather than being a "detriment" to claimants in other states, simply puts Ohio Dalkon Shield on an equal footing with them.

Second, as a practical matter, the fact that an Ohio Dalkon Shield victim may still proceed to trial and not be faced with a statute of limitation defense is not justification for pursuing litigation. Access to the court

certainly does not guarantee a judgment. The victim must still argue and prove her cause.

Third, approximately two-thirds of the corpus of the Trust remains, while the vast majority of claims (estimated at 80%) have been resolved. There is, therefore, no chance that the considerably less than 100 Ohio Dalkon Shield victims who claim serious injury in litigation will deplete, or even impact, the approximate \$1.5 billion dollars remaining in the fund for the victims.

#### CONCLUSION

Based upon the foregoing, Respondent respectfully requests this Court not consider the motion and brief of the Amicus Curiae.

Respectfully submitted,

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**APPENDIX**



## APPENDIX

Revival of Causes of Action for Effects of Silicone Breast Implants or DALKON Shields. L.1993, c. 419, § 1, eff. July 21, 1993, provided:

"Every cause of action for personal injury or death caused by the effects of silicone gel injected or implanted within the body, or caused by the effects of a silicone breast implant or its component parts implanted within the body, or caused by the effects of a DALKON shield intrauterine device inserted or implanted within the body, which is barred as of the effective date of this act or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired, is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act or in the case of an action caused by the effects of a DALKON shield intrauterine device an action by a claimant of the DALKON Shield Claimants Trust may be commenced within one year of certification to proceed with litigation provided, however, that this section shall not revive any action for damages for a wrongful act, neglect or default causing a decedent's death which has not been barred as of the date of the decedent's death and could have been brought pursuant to section 5-4.1 of the estates, powers and trusts law, and provided, further that for any revived claim or action, including third party claims and claims for contribution pursuant to article fourteen of the civil practice law and rules for which a notice of claim is or would have been required by law as a condition precedent to the claim or action, a notice of claim shall not be required. Any action pursuant to this section commenced prior to the effective date of this act shall not be dismissed based upon any period of limitations.

"This section shall not be applicable to any action for medical malpractice."

McKinney's Public Health Law § 2404

2a

SENATE BILL No. 607

AN ACT concerning civil procedure and civil actions;  
relating to limitation of civil actions related to  
Dalkon Shield victims.

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. (a) Except as provided in subsection (c), notwithstanding any other limitation contained in article 5 of chapter 60 of the Kansas Statutes Annotated, any civil action, except an action for relief on the ground of fraud, brought by, or on behalf of, any Dalkon Shield victim against the Dalkon Shield claimant's trust, shall be brought in accordance with procedures established by the A.H. Robins company, inc. plan of reorganization, and shall be brought within 10 years of the time in which such cause of action shall have accrued.

(b) Any civil action for relief on the ground of fraud brought by, or on behalf of, any Dalkon Shield victim against the Dalkon Shield claimant's trust, shall not be deemed to have accrued until the fraud of A.H. Robins company, inc. was discovered, without regard to the date of any physical injury occurred.

(c) The provisions of this act shall not affect any applicable statute of repose as otherwise provided by law.

(d) The provisions of this section shall be part of and supplemental to the provisions of article 5 of chapter 60 of the Kansas Statutes Annotated.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the SENATE, and passed that body

3a

SENATE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*President of the Senate.*

\_\_\_\_\_  
*Secretary of the Senate.*

Passed the HOUSE  
as amended \_\_\_\_\_

HOUSE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*Speaker of the House.*

\_\_\_\_\_  
*Chief Clerk of the House.*

APPROVED \_\_\_\_\_

\_\_\_\_\_  
*Governor.*



## California Legislature—1993-94 Regular Session

## ASSEMBLY BILL

No. 2855

Introduced by Assembly Members Archie-Hudson, Bronshvag, Barbara Friedman, Terry Friedman, Lee, Martinez, Moore, O'Connell, and Speier

(Coauthors: Senators Killea, McCorquodale, Torres, and Watson)

February 17, 1994

An act to add Section 340.7 to the Code of Civil Procedure, relating to limitation of actions.

## LEGISLATIVE COUNSEL'S DIGEST

AB 2855, as introduced, Archie-Hudson. Limitation of actions.

Existing law sets the statute of limitations applicable to actions of injury or death caused by the wrongful act or neglect of another at one year.

This bill would enact an exception thereto with respect to certain actions against the Dalkon Shield Claimants' Trust, as specified, extending the statute of limitation to 15 years, tolling such actions as specified, and providing that these provisions apply to actions which have lapsed.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. Section 340.7 is added to the Code of Civil Procedure, to read:

340.7. Notwithstanding subdivision (3) of Section 340, any civil action brought by, or on behalf of, any Dalkon Shield victim against the Dalkon Shield Claimants' Trust, shall be brought in accordance with the procedures established by A. H. Robins Company, Inc. Plan of Reorganization, and shall be brought within 15 years of the date on which the victim's injury occurred, except that the statute shall be tolled from August 21, 1985, the date on which the A. H. Robins Company filed for Chapter 11 Reorganization in Richmond, Virginia.

This section applies regardless of when any such action or claim shall have accrued or been filed and regardless of whether it might have lapsed otherwise be barred by time under California law.